87-757

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In Re: REUBEN STURMAN,

Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

Should a writ of mandamus issue directing a federal district judge presiding over a criminal tax case to grant petitioner's pretrial motion for discovery of submissions made by the United States government to the Swiss Confederation pursuant to a treaty between the two nations where:

(a) the government accused petitioner in these submissions - which were made in complete secrecy nearly six years ago - of extensive involvement in the affairs of organized crime in order to obtain private records of the petitioner's alleged Swiss banking relations otherwise protected from disclosure by the right of privacy guaranteed by Swiss law;

(b) petitioner has asserted that such allegations of organized crime involvement were completely and knowingly or recklessly false;

(c) petitioner sought to discover the submissions to prove that they contained material false statements, thereby enabling him to prosecute effectively a motion to dismiss the indictment or to suppress evidence based on substantial Fourth and Fifth Amendment claims; and

(d) postponing relief until an appeal after final judgment - the resolution of which is years away in this complex case - will cause petitioner irreparable harm not correctable on appeal because by then the passage of time will have eroded petitioner's ability to prove the falsity of the charges secretly made by the government so many years ago concerning events in the far distant past?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

In Re: REUBEN STURMAN

Petitioner

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Reuben Sturman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, denying petitioner's request for a writ of mandamus.[1/]

[1/] The respondent is the Honorable George W. White, Judge of the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Sixth Circuit denying petitioner's motion for rehearing is set forth in the Appendix at A1-A2. The unreported opinion of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix at A3-A5. The unreported opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is set forth in the Appendix at A6-A29. The unreported report and recommendation of the United States Magistrate is set forth in the Appendix at A30-A46.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit denying petitioner's request for a writ of mandamus filed pursuant to 28 U.S.C. § 1651(a) were

filed on June 25, 1987. Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on August 11, 1987. This petition seeks review of the judgment of a United States Court of Appeals entered in a civil case. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND TREATY INVOLVED

The constitutional provisions involved are the Fourth and Fifth Amendments to the United States Constitution which are set forth in the Appendix at A47-A48. The Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. No. 8302, is set forth, in relevant part, in the Appendix at A49-A71. Article 47 of the Swiss Federal

Banking Law is set forth in the Appendix at A72-A73.[2/] The All Writs Act, 28 U.S.C. § 1651(a), is set forth in the Appendix at A74. Rule 16(a)(1)(C), Fed. R. Crim. P., is set forth in the Appendix at A75.

STATEMENT OF THE CASE

This petition seeks review of the order of the United States Court of Appeals for the Sixth Circuit entered on June 25, 1987, denying petitioner's petition for a writ of mandamus.

Petitioner Reuben Sturman is a named defendant in a sixteen-count indictment charging him with tax-related offenses. The indictment was announced publicly by Attorney General Meese on June 27, 1985, and was the culmination of an intense

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[2/] This particular translation of Article 47 into English was performed and published by the Union Bank of Switzerland, Zurich.

investigation that began in 1977 and lasted eight years.[3/]

During the course of this investigation, the government determined that it would seek the aid of the Swiss government to search through records of Swiss bank accounts that it believed were owned or controlled by petitioner. It is evident from the indictment that the government plans to rely on many of the documents eventually supplied by Switzerland.

The government's access to such records was limited, however, by the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. No. 8302 (hereinafter referred

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3/ A superseding indictment was returned on June 25, 1987, but the changes made in that indictment are not material to this petition.

to as the Mutual Assistance Treaty or the Treaty), as well as Switzerland's historically recognized right to privacy in banking relations, a right which is viewed by the Swiss as an essential attribute of personal and political liberty.

One of the rudimentary policies underlying Swiss law is Switzerland's strong commitment to protecting personal rights and individual privacy interests. Meier, Banking Secrecy in Swiss and International Taxation, 7 Int'l Law. 16, 17 (1973). Switzerland's commitment to the preservation of privacy interests is reflected in Article 47 of the Swiss Federal Banking Law. This provision imposes stringent criminal penalties, including imprisonment and sizeable fines, for divulging banking record information - whether the information is divulged intentionally or negligently and

such a violation remains punishable after the individual's official or professional relationship is terminated.

The Swiss banking law which protects the privacy of banking relations is not an eccentricity that fancifully appears on the books, but, rather, it is a law with an historical commitment to protecting individual rights and to providing asylum to victims of persecution. As explained by one commentator:

> The broad scope of personal rights - normally extended also to aliens residing in Switzerland - merits particular legal protection in a country whose geographical position, tradition of neutrality and political stability made it for centuries a refugium for politically, religiously and racially persecuted people. It is not so long ago when Nazi agents on their ruthless drive to seize private assets of German Jews, attempted by all means to gain access to the identity of Jewish depositors in Swiss banks and thereby grossly violated the public order and sovereignty of Switzerland. The Swiss government deemed it necessary to curb such illegal activities of foreign powers, by supple-

> menting the civil law liability for violating banking secrecy with the criminal offense under provisions of the public law.

Meier, supra, 7 Int'l Law. at 17.

Although by adopting the Mutual Assistance Treaty the Swiss agreed to render assistance in the investigation of criminal matters, including the providing of banking records otherwise protected by a right to privacy, it only agreed to provide assistance upon a showing by the United States of reasonable cause to believe that the target of its investigation had committed one or more of a carefully defined schedule of offenses. More importantly, the Treaty explicitly states that Swiss assistance will not be provided when fiscal crimes, such as tax evasion, are involved. See Mutual Assistance Treaty, Chapter 1, Art. 2, c(5), 27 U.S.T. at 2026-27 ("This Treaty shall not apply to ... investigations or

proceedings ... concerning violations with respect to taxes ...."). Accordingly, if the United States requests to inspect bank records otherwise protected by Swiss privacy laws, the Swiss government will refuse to release them when tax crimes are the basis for the investigation.

A very narrow, precisely drawn exception exists, however, to the Treaty's blanket denial of assistance in the investigation of tax crimes. The Treaty permits access to confidential bank records for use in a tax investigation if the United States can demonstrate a number of distinct and well-defined elements outlined in Articles 6 and 7 of the Treaty. See Mutual Assistance Treaty, 27 U.S.T. at 2031-33. Specifically, a review of Articles 6 and 7 of the Treaty reveals that in order to gain access to the records under the Treaty

for use in a tax case, the United States must show the following:

1. The target of the investigation must be knowingly involved in the illegal activities of an "organized criminal group" as either

   a. a member of the group,

   b. an affiliate providing supervisory support or other important service to the group, or

   c. a participant in an important activity of the group (See Art. 6, ¶2); and

2. The "organized criminal group" must be an association of persons combined together for a substantial period of time for the purpose of obtaining monetary gains by illegal activities and of protecting its illegal activities against prosecution and which systematically and methodically employs violence or other illegal intimidation to protect its operations and which strives to influence politics or comparable institutions (See Art. 6, ¶3); and

3. The target of the investigation must be in the upper echelons of or significantly participate in an important activity of the organized

criminal group (See Art. 7, ¶2); and

4. The goverment has insufficient evidence for the purpose of the prosecution's ability to link the target with the crime committed by the organized criminal group in order to prosecute the target for his or her illegal activities (See Art. 7, ¶2); and

5. Assistance will facilitate a successful prosecution with the prospect of a long prison term and thereby cause an adverse impact on the organized criminal group (See Art. 7, ¶2); and

6. The securing of evidence is impossible or gravely burdensome without the cooperation of Switzerland (See Art. 7, ¶3).

If, and only if, the United States can satisfy all of these requirements, will or can the Swiss government provide access to confidential banking records for use in a tax investigation.

The process by which these factors are satisfied is further described in paragraph 1 of Article 8 of the Treaty,

27 U.S.T. at 2034. Paragraph 1 of Article 8 provides that where a country is required to have a reasonable suspicion, conclusion or opinion of some activity, involvement or status before assistance will be rendered, then the requesting country must furnish "information in its possession on the basis of which such suspicion, conclusion or opinion has been arrived at."

Nearly six years ago, in December 1981, the United States Department of Justice invoked this "organized crime exception" to the Treaty and submitted an application in secret to the Swiss requesting assistance in its investigation of petitioner for tax-related offenses.[4/] Accordingly, the Department

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[4/] This application was thereafter supplemented on several occasions with additional submissions by the government.

of Justice purportedly provided, in these secret submissions, information regarding specific people, groups, dates and episodes of criminal activity in support of its assertion that all of the requisite conditions for invoking this exception had been satisfied.

On the basis of these allegations, the Swiss agreed to drop the cloak of confidentiality and render assistance under the Treaty, thereby turning over voluminous records to the Department of Justice for use in the prosecution below. At no time was petitioner ever informed that he was the target of a request to obtain private records of his alleged relations with Swiss banks or that any such requests had been made; accordingly, he was never afforded an opportunity to rebut the government's allegations.

However, ever since petitioner learned of the government's request, by mere happenstance in 1984, he has unsuccessfully attempted to learn the nature and cause of the allegations against him, steadfastly maintaining that the United States government's submissions were knowingly or recklessly false and that the government had made these misrepresentations to subvert and circumvent the Mutual Assistance Treaty's requirements. Petitioner contends that the government was and is fully aware that he has never been a member of organized crime in the generic sense, much less a member of an organized criminal group as defined by the Treaty.

On October 31, 1985, four months after the return of the indictment against him, but nearly four years after the government had secretly charged him with organized crime involvement, peti-

tioner filed an extensive motion and brief in the district court for discovery of the government's submissions to Switzerland. Petitioner contended in this motion that the secret submissions were material to numerous defenses he intended to raise in a subsequent motion to dismiss the indictment or to suppress evidence. Passionately asserting that he has never been involved in organized crime, he argued that discovery of the specific content of the government's secret accusations would enable him to prove the utter and knowing or reckless falsity of the allegations made by the government, thereby demonstrating that the government had acquired its core evidence against him by violating his constitutional rights and by circumventing an international treaty.

Specifically, petitioner asserted, inter alia, that the submissions were

material to prove that the government's conduct violated his Fourth and Fifth Amendment rights.

In summary, petitioner maintained that the government violated his right to substantive due process when it conveyed to the Swiss knowingly or recklessly false representations that petitioner was a nefarious organized crime figure so as to gather evidence against him by circumventing its obligations under the Mutual Assistance Treaty. Petitioner asserted that such callous indifference to the profound obligations imposed by an international treaty, combined with the official submission of knowing or reckless misrepresentations about a citizen, offended the fundamental notions of fairness and civilized decency secured by the due process clause of the Fifth Amendment. Moreover, petitioner contended that the government deprived him of his

constitutional right to procedural due process when it falsely and secretly accused him of being a member of organized crime without ever affording him notice of the charges or a meaningful opportunity to respond to its secret accusations, thereby depriving him of cognizable property and liberty interests.

Finally, petitioner also maintained that his Fourth Amendment rights were violated when the government submitted knowingly or recklessly false statements to the Swiss in order to obtain access to private Swiss records. Petitioner asserted that Swiss civil and criminal law as well as the Mutual Assistance Treaty, independently and in combination, create a reasonable expectation of privacy in records documenting banking relations with Swiss banks. Petitioner argued that by making intentional

misrepresentations to the Swiss, the government intruded into this otherwise protected zone of privacy. Under the Treaty, only upon a showing of reasonable cause to believe that the target of the investigation committed a particular offense will access be permitted. In this manner, the procedures for invading the privacy of Swiss banking relations are directly analogous to those used to obtain a search warrant. Likewise, petitioner argued, that if the showing upon which access is sought and consequently gained consists of intentional or reckless misrepresentations, the guarantees secured by the Fourth Amendment against unreasonable searches and seizures are nullified.

It is readily apparent that the constitutional and international questions raised in this case are substantial and important issues of first impression

deserving of full factual development. In fact, it is the importance and novelty of these issues and their interrelationship with petitioner's defenses that make petitioner's entitlement to discover these documents clear and indisputable.

This discovery motion was referred to Magistrate David S. Perelman who, on August 21, 1986, recognized the importance of these issues and recommended that petitioner's motion be granted. Most significantly, the magistrate recognized that petitioner's asserted defenses were viable ones, raising issues of first impression and necessitating evidentiary development. See Magistrate's Opinion at 7-8. Specifically the magistrate reasoned:

> With regard to the legal theories considered by the parties in their briefs concerning the defendant's ability to obtain an order resulting in the exclusion of the evidence generated under the Treaty and consequent thereto,

> it appears that many of the questions raised may represent complex issues of first impression. While they have been addressed in more than a perfunctory manner, in this Court's opinion it would be premature to attempt any definitive rulings at this time and in this context. Given the significance of the issues raised and their facial novelty a much more comprehensive exposition, based upon a definitive record, would be in order. Nevertheless, this Court is well satisfied that the defendant has demonstrated that a reasonable possibility exists that he will be able to present a sustainable challenge, depending upon the facts which may be revealed by the discovery at issue.

Id. (footnote omitted).

The government thereafter filed objections to the magistrate's report and recommendation. In response, District Judge George W. White reviewed petitioner's motion for discovery and, on November 26, 1986, he denied the motion. In doing so, the district court did exactly what the magistrate refused to do: it decided the complex constitutional and international issues of first

impression on their merits without the benefit of any record. In determining that petitioner had no right to discover the secret accusations made against him by his government, the court held, in essence, that petitioner could present absolutely no defense based on any demonstrable lies or governmental misconduct, no matter how egregiously false the submissions were or how devoid of fair play the process was by which the private records were obtained.

Petitioner accordingly was denied his request for documents material to his defense and was deprived of an opportunity to develop a record to support these substantial constitutional claims. Thus, five years after the submissions were first transmitted to Switzerland, petitioner was no closer to learning what charges were leveled against him by the United States government regarding

alleged events that had to have been more than five years old; and with each passing day that the content of these submissions were concealed from him, petitioner's ability to gather evidence to rebut the secret charges was being eroded.

Therefore, petitioner filed a petition for a writ of mandamus in the United States Court of Appeals for the Sixth Circuit pursuant to the All Writs Act, 28 U.S.C. § 1651(a), requesting that the court of appeals direct the district court to vacate its November 26, 1986 order denying his motion for discovery of the Swiss submissions. The petition below also requested that the district court be ordered to adopt the August 21, 1986 report and recommendation of the magistrate which recommended granting petitioner's discovery motion in relevant part.

He filed the petition because he found himself in a truly extraordinary position in which mandamus relief was the only effective remedy available to him. Petitioner had been charged with tax fraud in a massive indictment, and was certain that the core evidence in support of the prosecution was gained by the secret communication of knowingly or recklessly false accusations against him by his own government to a foreign power. Yet after the expenditure of substantial energies to discover those accusations, he was no better equipped to begin the process of securing evidence to rebut them. And, with each passing day, his ability to gather evidence to rebut the unknown charges concerning events occurring in the far distant past was being undermined by the inevitability of fading memories, loss of witnesses and dissipation of documentary evidence.

Accordingly, petitioner recognized that he could not relinquish his right to relief from the district court's clearly erroneous ruling until an appeal after final judgment. First, because of the passage of so many years, he had already suffered serious harm in terms of his ability to mount a response to the government's accusations, which were made five years earlier and concerned alleged events occurring even before that date. Second, he realized that any relief he might hope to obtain upon postjudgment appeal would be totally ineffective. This was because the additional passage of what promised to be several more years before he could hope to obtain such relief would serve to exacerbate the harm petitioner had already suffered by being denied access to the charges for so many years already. He recognized that were he forced to wait another period of years

before being permitted to learn the nature and cause of the government's accusations against him, his ability to marshal the necessary evidence to rebut the government's charges would be further crippled and an appellate court would be rendered unable to correct the harm caused by the district court's failure to develop the factual record and its refusal to grant the discovery requested.

In the face of this argument, the court of appeals simply stated in a conclusory fashion that petitioner had failed to meet the requirements for mandamus relief.

Petitioner seeks review of the court of appeals' denial of his petition for a writ of mandamus.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY WHERE A CRIMINAL DEFENDANT HAS BEEN DENIED THE RIGHT TO DEVELOP A FACTUAL RECORD IN SUPPORT OF SUBSTANTIAL CONSTITUTIONAL CLAIMS OF FIRST IMPRESSION AND WHERE POSTPONING REVIEW UNTIL AFTER FINAL JUDGMENT WOULD BE AN INADEQUATE REMEDY BECAUSE OF THE DAMAGE CAUSED BY THE CONTINUED PASSAGE OF TIME.

This Court should grant a writ of certiorari to review the decision of the court of appeals because of the significance of the issues at stake. On one level, this case presents unique and important constitutional issues grounded in the Fourth and Fifth Amendments and an international treaty. At the heart of these claims is the ultimate task of discerning, through careful and thorough analysis, what limitations the Fourth and Fifth Amendments and the Mutual Assistance Treaty place upon the government in

its attempts to investigate and prosecute an individual.

On another level, this case concerns the irremedial harm caused to a criminal defendant when the trial court decides colorable constitutional issues of first impression without the benefit of any factual record. Underlying this issue is the need for determining when a criminal defendant has earned a right to discover documents and to develop a factual record to support viable constitutional defenses and to preserve these issues for appellate review.

Finally, this case presents an opportunity for this Court to specify what showing a petitioner must make with respect to the inadequacy of post-judgment relief in order to be entitled to a writ of mandamus.

A. The District Court Committed Clear Error In Denying Petitioner's Motion To Discover The Documents Submitted By The United States To Switzerland Pursuant To The Mutual Assistance Treaty.

Pursuant to Rule 16(a)(1)(C), Fed. R. Crim. P., a defendant has the right to discover documents which are material to the preparation of his defense. If a defendant can establish that he has a colorable defense and that the documents sought are material to that defense, therefore, the documents must be made available to him for inspection and copying. Cf. United States v. Murdock, 548 F.2d 599, 600 (5th Cir. 1977)(in the context of raising a selective prosecution defense, defendant must "demonstrate the materiality of what he seeks by proving a colorable entitlement to the defense before discovery is allowed"); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976)("Before a defendant

will be allowed to subpoena documentary evidence related to a selective prosecution defense, the party must show a 'colorable basis' for the claim.").

In the instant case, petitioner met his burden of establishing an entitlement to discover the documents he requested. First, petitioner put forth substantial constitutional pretrial defenses, principally based on the Fourth and Fifth Amendments, which would entitle him to suppression of evidence or dismissal of the indictment were these claims found meritorious. Second, the Swiss submissions are absolutely vital to these defenses, since the defenses themselves are based on the contention that the submissions are false.[5/]

5/ In fact, due to a cutoff date for filing pretrial motions, petitioner was forced to file his motion to dismiss or to suppress without the benefit of learning the precise
(Footnote continued)

At least one circuit court of appeals has recognized that the misconduct of United States authorities in procuring foreign assistance in criminal investigations pursuant to the Mutual Assistance Treaty at issue in the instant case may serve as a basis for Fourth, Fifth and Sixth Amendment claims. See Cardenas v. Smith, 733 F.2d 909 (D.C. Cir. 1984). It was also recognized by the Cardenas court that further discovery was necessary where the "district court [had] precipitously truncated appellant's discovery attempts," specifically holding that, in that case, discovery of the government's actual communication to Swiss authorities was required before the merits of appellant's Fourth, Fifth and

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content of the government's submissions to Switzerland. As of the time this petition was forwarded to the printer, that motion was still pending.

Sixth Amendment claims could be reached. Id. at 917.

Below, it will be demonstrated that petitioner asserted viable defenses, that discovery of the Swiss submissions was essential to the development of those defenses and that the district court's failure to grant petitioner's discovery motion under the circumstances of the instant case constitutes clear error.

1. Petitioner Asserted Colorable Fifth Amendment Claims.

Petitioner claimed that the government's actions in obtaining evidence to be used against him in a tax prosecution violated his right to both substantive and procedural due process.

a. Substantive Due Process.

Key to the concept of substantive due process is the notion that the government must adhere to standards of

fundamental fairness and civilized decency. See Rochin v. California, 342 U.S. 165, 173 (1952); Hampton v. United States, 425 U.S. 484, 494 n.6 (1976) (Powell, J., concurring). Substantive due process is a dynamic principal which is sensitive to individualized facts and is "not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

Substantive due process, therefore, has been found to have been violated under many different circumstances where the government's actions were found to have crossed the boundaries of fairness and decency, thereby abrogating the Fifth Amendment protections. See, e.g., Rochin, supra (pumping of individual's stomach to retrieve narcotics for use as evidence); Greene v. United States, 454

F.2d 783 (9th Cir. 1971) (government became pervasively involved in the criminal activities for which it sought to convict the defendant); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (government deliberately induced foreign officials to kidnap and detain the accused in violation of his constitutional rights); United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974) (in criminal prosecution, government permitted deportation of witnesses before defendant could interview them); cf. United States v. Gjieli, 717 F.2d 968, 979 n.11 (6th Cir. 1983)(refusing to condone deliberate misrepresentations made by the government in a criminal case), cert. denied, 465 U.S. 1101 (1984). The government's forcible invasions of an individual's privacy interests, its resort to consuming participation in illegal conduct and its

culpability for denying defendant access to witnesses, were all found to be practices so unfair and repugnant to the constitutional guarantee of due process of law that convictions of the accused based on such activities were reversed.

Similarly, when the government submits knowing or reckless falsehoods about one of its citizens to a foreign government in order to circumvent the obligations of an international treaty and to obtain records of that citizen's banking relations which are otherwise held in strict confidence, thereby depriving its citizen of legitimate rights granted him under foreign law, its conduct smacks of the same fundamental unfairness that these other courts have condemned. Accordingly, that citizen would be entitled to dismissal of the indictment or suppression of the illegally obtained evidence.

b. Procedural Due Process.

Petitioner was also denied his right to procedural due process when the government accused him of being an infamous organized crime figure in order to obtain voluminous records to use against petitioner without notifying him of the charges or affording him an opportunity to be heard. The due process clause of the Fifth Amendment requires that before the government can permanently deprive a citizen of a liberty or property interest, the citizen must be given notice of the charges that serve as a basis for the deprivation as well as a meaningful opportunity to respond to those charges. Cleveland Bd. of Educ. v. Loudermill, ___ U.S. ___, 105 S. Ct. 1487 (1985); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Wisconsin v. Constantineau, 400 U.S. 433 (1971);

Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Goss v. Lopez, 419 U.S. 565 (1975); Owen v. City of Independence, Mo., 445 U.S. 622 (1980); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

In this case, the government deprived petitioner of a cognizable property interest without procedural due process of law, when it invoked the organized crime exception to the Mutual Assistance Treaty to obtain confidential records of petitioner's alleged banking relations with Swiss banks without ever affording him notice of the charges or an opportunity to rebut them.

A cognizable property interest in the confidentiality of Swiss banking records is created by Swiss civil and criminal law as well as the Mutual

Assistance Treaty. Under Swiss law, any person owning a Swiss bank account possesses a statutorily protected entitlement to confidentiality in that account. Article 47, Swiss Federal Banking Law. Further, any person who owns a Swiss bank account possesses a contract right, by virtue of being the bank's customer, to confidentiality in his banking relationship with the bank as mandated by Swiss law. Finally, the Treaty recognizes a legal right to confidentiality in banking relations unless the individual is accused of and is proven to be a member of organized crime.

Independently and in combination, the Treaty, Swiss law and the contract between the bank and its customer confer an entitlement to confidential banking records that gives rise to a cognizable property interest protected by the due

process clause. Therefore, when the government invokes the organized crime exception, and is thereby provided access to records that were otherwise held in strict confidence, the government's actions directly implicate a property interest. See, e.g., Roth, supra (property interests can be defined by contract); Loudermill, supra (property interests can be defined by law); McLaurin v. Fischer, 768 F.2d 98 (6th Cir. 1985) (property interests can be defined by mutually explicit understandings).

Further, the government deprived petitioner of a cognizable liberty interest when it stigmatized him by secretly accusing him of being a member of organized crime so that it could remove the protections secured by the Treaty. See, e.g., Paul v. Davis, supra, 424 U.S. at 708-10 (recognizing that a

liberty interest is impaired when government succeeds in stigmatizing individual's good name to the extent of significantly altering his status); Constantineau, supra (same). By accusing a citizen of being an organized crime figure who systematically commits acts of violence and other heinous crimes, the government clearly places that citizen's "honor and integrity at stake," Constantineau, 400 U.S. at 437; and, when done in the context of the Mutual Assistance Treaty, the citizen's status is altered and his liberty interest affected if the Swiss, who would normally refuse assistance in producing confidential records in aid of tax prosecutions, agree to invade the privacy interest conferred upon the records sought by the United States.

2. Petitioner Asserted A Colorable Fourth Amendment Claim.

Petitioner asserted that the government conducted an illegal search and seizure in violation of the Fourth Amendment when it submitted knowingly or recklessly false information to the Swiss government solely to circumvent the Mutual Assistance Treaty's requirements for the purpose of obtaining private records of petitioner's alleged banking relations.

The Fourth Amendment prohibition against unreasonable searches and seizures protects against governmental intrusions into an individual's zone of privacy. Katz v. United States, 389 U.S. 347 (1967). Accordingly, if an individual has a reasonable expectation of privacy in the documents or articles seized, that interest is protected by the Fourth Amendment.

Petitioner maintains that bank customers have a reasonable expectation of privacy in the records documenting their banking relations with Swiss banks. Specifically, Swiss law provides that bank records documenting such banking relations must be held in the strictest confidence under penalty of imprisonment and/or a substantial fine. See Article 47, Swiss Federal Banking Law. Switzerland's banking law has for many years placed primary importance on personal and political privacy, having its history in a commitment to the protection of individual rights and the provision of asylum to victims of persecution. See Meier, Banking Secrecy in Swiss and International Taxation, supra, 7 Int'l Law. at 17. Swiss law imposes harsh penalties upon bank employees, even when they are merely negligent and even after employment has been terminated, not

because the employees reveal information which the bank would prefer to remain secret, but for the sole reason that the privacy interest in bank records "is a right only of the client and not of the bank." Id. at 24 (citing Entscheidungen des Schweizerischen Bundesgerictes (Decisions of the Swiss Federal Court) 74 (1948) I 492). For these reasons, an account holder may justifiably rely upon Switzerland's banking laws to maintain the privacy of his financial transactions documented by those records.

An account holder's expectation of privacy in Swiss bank records is also reflected in the Mutual Assistance Treaty itself. By adopting this Treaty with its carefully crafted provisions designed to maintain the integrity of the Swiss commitment to preserving the privacy of banking relations, the United States

government officially recognized the legitimacy of this zone of privacy.

The Treaty's provisions are designed to preserve the inviolate privacy interests secured by Swiss law by allowing intrusions into such privacy interests only under a very specific and narrow set of circumstances, and only upon particularized showings by the requesting state. The Treaty makes it clear that confidentiality of an individual's banking relations may only be invaded when there is reasonable cause to believe that the target of the investigation has committed one of the carefully defined schedule of criminal offenses covered by the Treaty or that the target is an infamous member of an organized criminal group.6/

6/ Article 47 of the Swiss Federal Banking Law combined with the strict requirements of the Mutual Assistance
(Footnote continued)

Accordingly, the procedures for invading the privacy of Swiss banking relations are directly analogous to those used to obtain a search warrant since specific showings must be made before permission will be granted for the search and seizure of banking records, and since the requirements are intended to safeguard against unreasonable intrusions into protected privacy interests. Therefore, any evidence obtained pursuant to the Mutual Assistance Treaty on the basis of statements which were deliberately or recklessly false must be suppressed. Franks v. Delaware, 438 U.S. 154, 164-65 (1978)(deliberately or recklessly false statements made to procure a search

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Treaty place this case in stark contrast to United States v. Miller, 425 U.S. 435 (1976) and United States v. Payner, 447 U.S. 727 (1980), where this Court did not find a reasonable expectation of privacy in the banking records maintained in the United States or in the Bahamas.

warrant abrogate the Fourth Amendment protections requiring evidence seized pursuant to the warrant to be suppressed).

Having asserted substantial constitutional claims encompassing issues of first impression, it was clearly erroneous for the district court to deny petitioner's motion for discovery and to prevent the development of a factual record on these claims.

B. A Writ of Mandamus Is The Only Adequate Remedy In The Instant Case.

That this case involves timely issues of first impression and of great consequence cannot seriously be debated; at stake is the vitality of the Fourth and Fifth Amendments, the integrity of an international treaty and the diplomatic relations between two countries. By disallowing the discovery necessary to

develop a full factual record so as to allow an informed decision on these complex issues and to preserve the issues for appeal, the district court committed clear error. The ultimate question presented by this case, however, is whether a writ of mandamus is the appropriate mechanism for correcting the district court's clearly erroneous ruling.

On several occasions, this Court has enunciated broad guidelines regarding the issuance of a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). See, e.g., Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 34 (1980)(per curiam); Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Will v. United States, 389 U.S. 90, 95 (1967); Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964); LaBuy v. Howes Leather Co., 352 U.S. 249, 255 (1957); Parr v. United States, 351 U.S. 513, 519-20

(1956); Bankers Life & Casualty Co. v. Holland, 349 U.S. 379, 383 (1953); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Some of these cases have focused on unusual factors to consider in granting mandamus relief such as the novelty of the issues presented, see Schlagenhauf, 379 U.S. at 110, or an inferior court's persistent disregard of the federal rules promulgated by the Supreme Court, see Will v. United States, 389 U.S. at 96. In each of these cases, however, the Court has stated in general, broad terms that the fundamental precondition for the issuance of a writ of mandamus is that the petitioner must have no other adequate means of relief, such as direct appeal following final judgment.

The instant case presents an ideal opportunity for this Court to refine that fundamental prerequisite for mandamus relief by exploring what type of showing

a petitioner must make with respect to the inadequacy of postjudgment relief in order to be entitled to a writ of mandamus. In the instant case, the degree and kind of harm which petitioner will suffer if he is not granted immediate review of the district court's clearly erroneous ruling is as acute as any case imaginable.

First, as outlined above, petitioner has already waited years to learn the cause and nature of the government's accusations against him. By the time petitioner first filed his motion for discovery of the government's secret submissions to Switzerland in which petitioner was accused of being extensively involved in the affairs of organized crime, nearly four years had passed since the government had made the submissions. Further, the government must have referred to alleged events that

occurred even prior to the date of the submissions. The passage of four or more years before an accused is given notice of the charges against him has an obvious impact on the accused's ability to gather evidence to rebut the charges.

However, petitioner has been forced to wait considerably longer than four years. When the district court eventually denied petitioner's discovery motion, an additional year had passed by; and, presently, another year has come and gone during petitioner's persistent attempt to learn the specific content of, and to rebut, what his government secretly and falsely accused him of so that it could gain access to confidential banking records. Therefore, nearly six years have already elapsed since the government made its submissions to Switzerland.

As has been recognized in the analogous context of pre-indictment delay:

> The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the state may proceed methodically to build its case while the prospective defendant proceeds to lose his.

United States v. Marion, 404 U.S. 307, 331 (1971) (Douglas, J., concurring) (emphasis added).

With the continued passage of time, the harm already suffered by petitioner is heightened. The government has vigorously and methodically resisted all of petitioner's efforts to discover the secret accusations it has made against him, thereby prolonging the revelation of

those charges until a point in time when it will be too late for petitioner to rebut them effectively. Thus, the government has proceeded "to build its case" while petitioner has been foreclosed from gathering the necessary testimonial and documentary evidence to develop his substantial Fourth and Fifth Amendment defenses, day by day losing the opportunity to establish these defenses.

There can be no doubt that such a passage of time has had a deleterious effect upon petitioner's ability to defend himself. Already, potential witnesses will be required to recall events occurring in the far distant past, and there is little doubt that some witnesses will be impossible to locate, by virtue of death or relocation, and that documentary evidence will have been lost or destroyed.

This harm clearly will be magnified if petitioner is forced to forsake his entitlement to relief from the district court's erroneous ruling until he can file a postjudgment appeal. When the procedural realities of this case are considered, it is evident that the adjudication of such an appeal is years away. First, this case is not close to being ready for trial. The government has stated its intention to take depositions overseas and numerous pretrial motions are pending before the district court. Further, a massive amount of evidence must be marshaled in preparing the defense and prosecution. Second, the trial itself is expected to last at least four and one-half months. Finally, the tasks of processing an appeal from this case which involves intricate questions of law will be formidable.

Accordingly, even if petitioner finally obtains relief from this erroneous ruling following final judgment, such relief will be a totally ineffective cure to the harm created by the passage of at least eight or more years. The handicap petitioner presently suffers in offering evidence to demonstrate the falsity of the government's statements to the Swiss and the government's bad faith or recklessness in making those statements will be exacerbated exponentially. As a result, petitioner's defenses - which, although they raise novel issues of law, the defenses are nonetheless grounded in sound legal principles - may be completely lost.

The validity of petitioner's argument that his defense has been, and will continue to be, substantially impaired by the passage of time is well demonstrated by the fact that Congress enacted a five-

year statute of limitations for the prosecution of most criminal acts. 18 U.S.C. § 3282. Congress enacted such legislation in recognition of the debilitating blows the passage of years can inflict upon a defendant's ability to defend himself. See Marion, supra, 404 U.S. at 322 (the five-year statute of limitations in section 3282 gives rise to "an irrebutable presumption that a defendant's right to a fair trial would be prejudiced"). Here, of course, more than five years have already passed since the government first sent its submissions to the Swiss; if relief is postponed until an appeal after final judgment, petitioner will have been denied the opportunity to review the government's accusations for eight or more years.

Because of the acute harm that would befall petitioner were he required to wait for postjudgment relief, petitioner

has clearly demonstrated that he not only has no other avenue to obtain relief, but that a writ of mandamus should issue ordering the district court to vacate its November 26, 1986 order and to permit discovery of the documents at issue. The order of the court of appeals summarily denying petitioner's request for mandamus relief should, accordingly, be reversed.

CONCLUSION

This case chronicles one citizen's long struggle to learn the nature and cause of accusations made by his government in secret nearly six years ago, which charged him with extensive involvement in the affairs of organized crime and which, to this day, remain concealed from him. This case also reflects this citizen's unyielding effort to protect his absolute right to mount a vigorous defense to criminal charges brought

against him. At the heart of this petition is the fundamental unfairness of forcing petitioner to wait years, until adjudication of an appeal after final judgment, before a reviewing court relieves him of the district court's order denying him all access to the secret charges made by the government. For by then, the passage of yet several more years will have so eroded petitioner's ability to marshal the evidence needed to prove the knowing falsity of the government's charges as to render appellate courts powerless to remedy the damage wrought by the district court's order.

At stake in this case is the integrity of an international treaty, for, petitioner has steadfastly maintained, it was to circumvent the Mutual Assistance Treaty and to invade the zone of privacy and confidentiality in records of Swiss

banking relations that the government secretly submitted false information about petitioner to the Swiss authorities.

At issue in this case is whether the Constitution permits the government to submit knowingly or recklessly false information about a citizen in complete secrecy so as to obtain private foreign records about that citizen otherwise completely protected from disclosure by foreign law and an international treaty, without ever affording the citizen notice of the charges or an opportunity to rebut them.

Finally, at jeopardy in this case is a criminal defendant's right to discover the documents which are necessary to develop colorable defenses raising novel, yet sound arguments based on the Constitution and an international treaty. This case, indeed, involves issues of extra-

ordinary importance and timeliness deserving of review by writ of certiorari by this Court.

For the foregoing reasons, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

No. 87-3046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:	)	
REUBEN STURMAN,	)	
Petitioner	)	ORDER

BEFORE: MERRITT, MARTIN and WELLFORD, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original sub-

mission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/John P. Hehman
John P. Hehman,
Clerk

No. 87-3046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re:	)	
	)	
REUBEN STURMAN,	)	O R D E R
	)	
Petitioner	)	
	)	

BEFORE: MERRITT, MARTIN and WELLFORD, Circuit Judges

In June 1985, petitioner Sturman was indicted on sixteen tax-related offenses, including conspiracy to defraud the United States and attempting to evade income taxes. The prosecutor's evidence includes records from Swiss bank accounts in the names of corporations which Sturman allegedly owned or controlled using ficticious names and names of nominees. He seeks a writ of mandamus directing the district court to vacate its order of November 26, 1986, which denied discovery of documents submitted by the Justice Department to the Swiss

Government when it sought the bank records under the Treaty for Mutual Assistance in Criminal Matters. Sturman claims that the Justice Department misrepresented that he was either a member of the upper echelons of or participated significantly in an important activity of an organized criminal group. The district court responded to the petition by submitting a current copy of the docket sheet.

Mandamus is an extraordinary remedy. Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 402 (1976). Upon consideration, we conclude that petitioner has failed to meet the requirements for a writ of mandamus as set out in In re Post-Newsweek Stations, Michigan, Inc., 722 F.2d 325, 329 (6th Cir. 1983) (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953)). See

also In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984).

It is ORDERED that the petition for writ of mandamus is denied.

ENTERED BY ORDER OF
THE COURT

/s/John P. Hehman
Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff vs. REUBEN STURMAN, et al. Defendants	)	CR85-133 MEMORANDUM AND ORDER

On December 4, 1985 the Court ordered certain pre-trial motions in this criminal case to be referred to the United States Magistrate for a report and recommendation pursuant to 28 U.S.C. §636(b)(1)(B) and Local Civil Rule 19.08. The Court has now received the Magistrate's report and recommendation concerning defendant Reuben Sturman's motion for discovery of all documents and information submitted by the United States to the government of Switzerland in connection with the United States'

efforts to gather evidence in this case and for discovery of all related documents. Defendants David Sturman and and [sic] Mel Kamins have filed similar motions. This matter is before the Court upon the government's objections to the Magistrate's report and recommendation.

The government acquired information and documents from the government of Switzerland under the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters. This Treaty expressly provides that its terms do not apply to violations concerning taxes, the type of crime for which the defendants are charged. Chapter I Article 2, paragraph 1 (c)(5). An exception to this exclusion, Chapter II, Article 6 provides:

> 1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise

available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

   a. knowingly involved in the legal activities of an organized criminal group, described in paragraph 3, and who is:

      1. a member of such a group; or

      2. an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

      3. a participant in any important activity of such a group; or

   b. a public official who has violated his official responsibilities in order to knowingly accommodate the desires of such a group or its members.

3. For the purpose of this Chapter the term "organized criminal group" refers to an association or group of persons combined

together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out is [sic] purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

1. strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

2. associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article 7 provides in part:

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income ... only if, according to the information furnished by the requesting State:

   a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

   b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

   c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of

> time so as to have a significant adverse effect on the organized criminal group.

In order to receive information under the Treaty, the government must comply with the above provisions. The government must represent to the Swiss officials that Reuben Sturman was either a member of the upper echelons of an organized criminal group or participated significantly in an important activity of an organized criminal group. Defendant contends that allegations of this type made to Swiss officials to obtain information were false and in violation of his Fourth, Fifth and Sixth Amendment rights under the Constitution of the United States. Therefore these documents are material to his defense and he is entitled to discovery of these documents.

Defendant's first contention is that misconduct in procuring foreign assistance in criminal investigations may

serve as a basis for claims based on the Fourth, Fifth and Sixth Amendments. The defendant relies on Cardenas v. Smith, 733 F.2d 909 (D.C. Cir. 1984). In the Cardenas case the Swiss government seized the plaintiff's assets by freezing her bank account. Thus Fourth and Fifth Amendment claims were raised concerning the propriety of the seizure. The case at bar is distinguishable from Cardenas in that no property of Reuben Sturman was seized. In addition Cardenas was a civil action wherein damages were sought and the more liberal discovery procedures under the Federal Rules of Civil Procedure applied.

Article 37 of the Treaty provides:

1. The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to ob-

tain other judicial relief in connection with requests under this treaty... The Technical Analysis of the Treaty explaining Article 37 states in Part at page 63 and 64:

> This Article governs the rights of persons to appeal determinations with respect torequests [sic] for assistance pursuant to the Treaty. Separate provisions were necessary for each country because of differences in legal requirements. Enforcement of the provisions of the Treaty is a matter of the Contracting Parties and does not give rise to any right on the part of defendants, subjects, witnesses or other persons to obtain judicial relief except as specially provided therein.
>
> With regard to actions in the United States, Paragraph 1 provides that except for rights with respect to:
>
> (a) searches and seizures (Article 9 para. 2:) the restrictions in the Treaty shall not give rise to a right on the part of any person to take action to suppress or exclude evidence or to obtain other judicial relief.

Review of claims arising under the Treaty is prohibited but claims stemming from the Constitution are not precluded. Cardenas v. Smith at 918. Thus defendant

may have a meritorious argument if the government's conduct amounts to an illegal search and seizure.

A search and seizure occurs when an individual has a legitimate expectation of privacy and this expectation is one that society recognizes as reasonable. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), United States v. Bailey, 628 F.2d 938 (6th Cir. 1980).

Defendant has not satisfied the first part of the test requiring a legitimate expectation of privacy. The Supreme Court has held that there is no legitimate expectation of privacy in bank records. Bank documents contain information voluntarily conveyed to the banks and distributed to bank employees in the ordinary course of business. Bank records are used in criminal tax and regulatory investigations and proceedings.

The depositor takes the risk that information given to the bank will be conveyed to the government. There are [sic] no Fourth Amendment interest in records kept by banks. United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). Furthermore, bank secrecy laws do not create a legitimate expectation of privacy not available in the United States. United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), United States v. Ghidoni, 732 F.2d 814 (11th Cir. 1984). Bank records are not protected from disclosure by the constitution. United States v. Ghidoni at 817.

The second prong of the test as to whether a search and seizure violates constitutional rights requires a showing that if there was an expectation of privacy, it must be one that society recognizes as reasonable. This part of the

test has also not been satisfied. The United States has a treaty with Switzerland which provides for production of secret bank records. The existence of the treaty negates the reasonableness of the expectation of privacy. The conclusion must be that no search and seizure was conducted.

Additionally, the government points out that it has received numerous records from several Swiss banks which includes signature cards from thirty one separate accounts in the names of individuals and corporations. Reuben Sturman's name does not appear on any of these accounts. The government contends that Mr. Sturman has signed these accounts in several difference [sic] ficticious names. If Mr. Sturman truly had an expectation of privacy he would have used his true name on the accounts.

The accounts in question were

located at three different Swiss banks. Each of these banks has a branch in New York City. The government could have obtained these records through the U.S. branches of the Swiss banks. United States v. Ghidoni at 732 F.2d 817 n 5.

The government argues that the defendant does not have standing to succeed in his Fourth Amendment violation claim. A defendant has standing if the alleged constitutional violation infringes upon a right which the Fourth Amendment was designed to protect. Fourth Amendment rights are personal rights. A person who claims damage by an illegal search and seizure through introduction of evidence obtained by a search of a third person's premises or property has no standing to assert a Fourth Amendment claim. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Since bank records

are the property of the bank, not the individual depositor, Reuben Sturman has no standing to maintain a Fourth Amendment challenge. United States v. Payner, supra. Also, as previously stated, Reuben Sturman's name does not appear on these accounts. According to case law he personally has not suffered a deprivation of constitutional rights. Therefore Reuben Sturman does not have standing to challenge a search and seizure.

Defendant has enumerated several other reasons why the government's conduct amounts to a search and seizure. These contentions will be discussed briefly. A seizure of property occurs when there is some meaningful interference with an individual's possesory [sic] interests in that property. United States v. Jacabsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). But the government in the case

at bar obtained copies of documents belonging to Swiss banks, not to Sturman.

The treaty provides a procedure for obtaining documents. Those provisions do not refer to search and seizure. The government submitted documentation to the Swiss government to begin the necessary procedures to enable the Swiss to perform their obligations under the Treaty. This conduct was not a search and seizure.

The usual method for obtaining bank records is by subpoena duces tecum. The government could have obtained the documents in this manner from the New York branches of the Swiss banks. United States v. Ghidoni, supra. Because the government used the methods provided by the treaty does not transfer its conduct into a search and seizure.

Defendant's argument based on Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), that a search

warrant may be invalidated because of inaccuracies in a supporting affidavit is without merit because the Fourth Amendment is not applicable. Also, Franks v. Delaware requires the defendant to make a substantial showing that the affiant's statements were false or with reckless disregard for the truth. Conclusory statements are insufficient. United States v. Phillips, 727 F.2d 392 (5th Cir. 1984). Defendant has not shown that representations to the Swiss government, if any, were false.

The defendant indicated that he intends to move for dismissal of the indictment or suppression of evidence obtained from Swiss authorities on the grounds that the government engaged in blatently [sic] illegal investigatory tactics which violated his due process rights under the Fifth Amendment.

Article 37 of the Treaty states:

> "The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty."

This provision seems to preclude defendant's Fifth Amendment argument. United States v. Johnpoll, 739 F.2d 702 (2nd Cir. 1984).

Defendant's next contention is that the requested documents are material to the question of whether the government introduced false testimony to the grand jury, introduced the spector of organized crime into a prosecution where such suggestion was unwarranted and instituted the instant prosecution knowing that much of the evidence was acquired on the basis of knowing falsehoods in violation of defendant's Fifth and Sixth Amendment rights.

There exists a presumption of regu-

larity concerning grand jury proceedings. United States v. Battista, 646 F.2d 237 (6th Cir. 1981), cert. denied 454 U.S. 1046, 102 S.Ct. 586, 70 L.Ed.2d 488 (1981). In order to obtain grand jury materials under Rule 6 (e)(3)(C)(ii) of the Federal Rules of Criminal Procedure, a defendant must show that grounds may exist to support a motion to dismiss because of matters occurring before the grand jury. Defendant must show prejudice and the existence of a long standing problem in the grand jury proceedings in the district when prosecutional [sic] misconduct is alleged. United States v. Griffith, 756 F.2d 1244, 1249 (6th Cir. 1985); United States v. Lamoureux, 711 F.2d 745, 747 (6th Cir. 1983).

Affidavits of Attorneys Stephen H. Jigger and David O. Baur state that none of the documents provided to the Swiss government were given to the grand jury

nor was the grand jury advised of any portion of the contents of those documents. Defendants' arguments on this ground must fail.

Defendant also seeks discovery of the documents given to Swiss authorities in order to persuade the Court to exercise its supervisory powers to exclude unlawfully obtained evidence or to dismiss the indictment in order to preserve the integrity of the law enforcement process.

The United States Supreme Court in United States v. Payner supra, concluded:

> [T]he supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the Court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices.

As previously discussed, the bank records obtained by the government were not the property of Reuben Sturman. The records belonged to the bank and also were in the names of other individuals and Corporations. Therefore the Court's supervisory powers cannot be invoked.

The defendant's next contention is that the submissions of the United States to the Swiss authorities under the Treaty are material to defendant's objections to foreign records proposed for admission into evidence by the government under 18 U.S.C. §3505.

18 U.S.C. §3505(a)(2)(b) provides the procedure regarding foreign documents. The party wishing to introduce foreign documents into evidence must provide written notice of that intention to each other party. The opposing party must then file a motion opposing this evidence. This statute pertains to

admission of evidence as opposed to suppression. The government has given defendant copies of the Swiss records it obtained. In order to determine whether to file a motion to exclude the evidence defendant need only review the records. The documents given by the United States to Switzerland to obtain bank records do not have any relevance to laying a foundation for the records nor their veracity. The admission of the records is subject to the admissibility restrictions found in the Federal Rules of Evidence. See 18 U.S.C. §3505(a)(1) and (2).

Defendant argues that the documents given by the United States to Switzerland which contained statements of Reuben Sturman's status as an organized crime figure are material to his defense and should be available for discovery.

In United States v. Felt, 491

F.Supp. 179 (D.D.C. 1979), the Court set forth criteria for determining when documents are material for the preparation of a defense. These are: (1) there must a strong indication that the documents will play an important role in uncovering admissible evidence; (2) aid witness preparation; (3) corroborating testimony; or (4) assisting impeachment and rebuttal. The documents given to the Swiss authorities are not of the type that can be used for the four criteria set forth in United States v. Felt.

Rule 16 (a)(2) precludes discovery of reports, memoranda or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. The documents in question were made in connection with the investigation of the defendant and are not discoverable under

Rule 16.

Defendant suggests that the requested documents are discoverable pursuant to the Court's discretionary power to order disclosure. The defendant must show a need for discovery of material government files. The need must be readily apparent to the Court. United States v. Germain, 411 F.Supp. 719 (S.D. Ohio 1975). The Court has previously determined that defendant does not have a specific need for these documents. This argument is without merit.

Finally, defendant contends that the documents in question are discoverable under the Supreme Court's ruling in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under Brady a prosecutor must disclose evidence favorable to the defendant, that if suppressed would deprive him of a fair trial. United States v. Bagley, ____ U.S. ____,

105 S.Ct. 3375 (1985). Brady material need not be produced until time of trial. United States v. Candor, 423 F.2d 904 (6th Cir. 1970). The Brady material must be disclosed to defendant in a timely manner to enable him to use it at trial. Brady may be invoked after trial. United States v. Short, 671 F.2d 178 (6th Cir. 1982), cert. denied, 457 U.S. 1119, 102 S.Ct. 2932, 73 L.Ed.2d 1332 (1982). There is no denial of due process if the material is received in time to be effectually used at trial. Thus defendant's request for Brady material is premature.

Defendant also claims that the submissions to the Swiss authorities to obtain documents were prepared by government agents who may be called to testify. These submissions containing false information will become relevant for impeachment purposes. This argument is

without merit at this time because of the Jencks Act, 18 U.S.C. §3505. The Jencks Act provides that statements in the possession of the government may not be discovered until the witness has testified on direct examination.

Accordingly, for the reasons discussed above the report and recommendation of the Magistrate is rejected. The motions of Reuben Sturman, David Sturman and Mel Kamins for discovery of all documents and information submitted by the United States to the government of Switzerland in connection with the United States' efforts to gather evidence in this case and for discovery of all related doucments IS DENIED.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America	)	Case No. CR85-133
Plaintiff	)	Magistrate David S. Perelman
v.	)	
Reuben Sturman, et al.	)	Judge George W. White
Defendant	)	
	)	REPORT & RECOMMENDATION

Reuben Sturman has moved for "discovery of all documents and information submitted by the United States to the government of Switzerland in connection with the United States' efforts to gather evidence in this case and for discovery of all related documents."[1/] Similar motions have been filed by defendants David Sturman and Mel Kamins. The most extensive briefing has been in the con-

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1/ The material sought thereunder is more specifically designated in four categories at pages 1 and 2 of the motion.

text of Reuben Sturman's motion, the government relying upon its response to that motion as its opposition to the other two, and the matter will be considered in the context of that motion for purposes of this Report and Recommendation.

This motion goes to evidence obtained by the United States government from Swiss banks through the government of Switzerland pursuant to a "Treaty Between The United States And The Swiss Confederation For Mutual Assistance In Criminal Matters" (hereinafter the Treaty). That material appears to be central to the government's proofs under the instant indictment, and if the defense could preclude its introduction as trial evidence the prosecution's case would, at the very least, be significantly impaired if not fatally undermined.

In the parties' briefs it is recognized that prior to consumation of the Treaty it was virtually impossible under Swiss law to obtain information from Swiss banking authorities for use as evidence in a criminal prosecution, or for any other purpose for that matter. The Treaty, entered into on May 25, 1973, provides some clearly defined exceptions to that cloak of secrecy.

As a general proposition the Treaty is not applicable to alleged tax violations, Chapter I, Article II, Paragraph 1(c)(5). There is, however, an exception to that exemption. The Treaty further provides at Chapter I, Article II, Paragraph 2:

> Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in subparagraphs c.(1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article VI and...

b. in the case of subparagraph c.5, any applicable conditions of Article 7 are satisfied.

Chapter II of the Treaty is headed "Special Provisions Concerning Organized Crime". Article 6, the first provisio[n] thereof, reads in full text:

> 1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.
>
> 2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:
>
> a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:
>
> (1) a member of such a group; or
>
> (2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by perform-

ing other important services; or

(3) a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accomodate the desires of such a group or its members.

3. For the purpose of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

(1) strives to obtain influence in politics or commerce, especially in political bodies or organizatiions [sic], public

administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article VII, insofar as pertinent to this action, provides:

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations or provisions on taxes on income...only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the

crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

It would thus appear that in order for the United States to obtain the assistance of Switzerland in obtaining evidence under the Treaty concerning alleged violations of the tax laws it was incumbent upon the United States, as the requesting party, to demonstrate to the satisfaction of the appropriate Swiss authorities[2/] that during the relevant

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2/ Under the Treaty requests are processed through a Central Authority, which for Switzerland is the Division of Police of the Federal Department of Justice and Police in Bern (Chap. VII, Art. 28(1)).

time period Reuben Sturman was or was reasonably believed to be:

1) knowingly involved in the illegal activities of an "organized criminal group", as that term is defined in the treaty, as either --

   (a) a member of the group,

   (b) an affiliate providing some supervisory, managerial, regular support or other important service to the group, or

   (c) a participant in any important activity of the group, and

2) an upper echelon member of such group or participating significantly in some fashion in any important activity of such a group.

Satisfaction of that obligation would include the subsidiary demonstration that the organized criminal group with which the defendant was allegedly allied came within the purview of the definition of Article 6, paragraph 3. Further, a showing would be called for that the available evidence was insufficient to

link Mr. Sturman with crimes committed by the organized criminal group with which he is alleged to be connected and that the requested assistance should facilitate his prosecution and result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

In the course of briefing this motion government counsel offered to provide the material submitted to the Swiss authorities of in camera inspection. The government's initial submission, on the face of the documents tendered, included both documents tendered to the Swiss authorities and internal documents between United States law enforcement and/or investigative agency representatives. It was also represented at that time by government counsel that there were additional documents which had to be retrieved to

complete the file of material provided the Swiss authorities. This Magistrate returned that original submission to government counsel with directions to segregate out the documents not forwarded to Switzerland and to return the file when fully reconstructed. That submission has been tendered, and is transmitted herewith.3/

In the course of defendant's brief alternative grounds are asserted as to the relevance of the discovery sought. Foremost among those is the contention that the defendant is not a member of organized crime, and that any representations to the contrary made by the United States authorities to the Swiss

3/ This Court has some reservations as to the completeness of that packet. From a reading of certain of the materials it would appear that generalized references are made to other submissions which were not plainly identifiable by this Court with any documents as reviewed.

authorities in order to bring the request for assistance within the narrow exception applicable to tax prosecutions would have to have been false. Proceeding from the premise that he could prove the unreliability of any such representations, the defendant advances several legal theories in support of the position that such false representations would result in the rejection of any evidence obtained through the Swiss authorities or deriving therefrom.

The government responds that the defendant's position as to the representations made to the Swiss government is pure speculation, and that absent some showing that false or unreliable information was conveyed the defendant cannot be said to have satisfied the requisite of Rule 16 of the Federal Rules of Criminal Procedure---that the documents sought "are material to the preparation of his

defense." The government also challenges the legal theories advanced by the defendant as to his standing and ability to have the evidence in question suppressed or excluded at trial.

The government's contention that the defendant has not made a sufficient showing that the information conveyed to the Swiss authorities was false and/or unreliable or did not conform with and/or satisfy the requisites of the Treaty presents a classic "Catch-22" proposition. On the one hand, the defendant is to be precluded from discovery because he cannot demonstrate materiality, in that he cannot state with any certainty in what respects the documents sought would demonstrate falsity or lack of satisfaction of the Treaty's requirements. On the other hand, he cannot make such a demonstration without having access to the documents in question. And

so it goes, on and on, in an endless circle.

In this Court's opinion, denying a defendant the right to determine whether the United States Government has complied with an international treaty in seeking evidence against him is inconsistent with the basic tenets of our jurisprudence, particularly when such denial would itself arise from the lack of access to the material sought. This Court finds the analogy drawn by defendant between the affidavit submitted by law enforcement officers seeking a domestic search warrant and submissions by the requesting state under the Treaty to be an apt one. Each is intended to demonstrate to a neutral third person that violations of the criminal laws have occurred and that law enforcement officials have a legitimate basis for invoking the powers of the sovereignty in order to obtain fur-

ther evidence of such crimes. There is no doubting the right of a defendant to be informed of the basis upon which a search warrant was requested and issued, nor of his right to challenge the truthfulness and/or sufficiency of the averments made in the affidavit. Although the fact that this proceeding is pursuant to an international treaty may effect the nature of the challenges sustainable by the defendant, this Court cannot perceive of any valid reason why the same threshhold [sic] right of knowing what allegations have been made in support of the attempt to gather evidence should not be accorded in each instance.[4/]

[4/] Without intending to impugn the integrity of the government's motivation, the defendant's observation that the prosecution's determined resistance to disclosure, both here and in proceedings brought by defendant in Switzerland for that same purpose, could cause a reasonable

(Footnote continued)

With regard to the legal theories considered by the parties in their briefs concerning the defendant's ability to obtain an order resulting in the exclusion of the evidence generated under the Treaty and consequent thereto, it appears that many of the questions raised may represent complex issues of first impression. While they have been addressed in more than a perfunctory manner, in this Court's opinion it would be premature to attempt any definitive rulings at this time and in this context. Given the significance of the issues raised and their facial novelty a much more comprehensive exposition, based upon a defi-

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person to wonder if there is something to hide is not without some facial attraction. It is noted that there may be some inconsistency between statements made by the Swiss courts as to representations made by the Justice Department as to the defendant's rights of discovery in this action and the position taken by the government herein.

nitive record, would be in order.[5] Nevertheless, this Court is well satisfied that the defendant has demonstrated that a reasonable possibility exists that he will be able to present a sustainable challenge, depending upon the facts which may be revealed by the discovery at issue.

Although the parties' briefing and this opinion have concentrated on the documents submitted to the Swiss government as the factual focus, the defendant's motion reaches well beyond those documents. While it may be that at some point the defendant can establish entitlement to more than the documents ex-

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[5] Further, this Court is not satisfied that all the potential critical issues have been presented. For, example, the question of to what extent and in what manner the Swiss authorities['] acceptance of the American submissions may be challenged, or second-guessed, has not been extensively directly explored.

changed between the two governments, the necessity for that discovery can be better determined after the defendant has been provided with the core documents and can clearly articulate any further position based thereon.

It is, therefore, recommended that the defendant's motion be granted with regard to the documents provided for *in camera* inspection, and be held in abeyance in all other particulars pending a further detailed demonstration of materiality.

/s/David S. Perelman
DAVID S. PERELMAN
United States Magistrate

Dated: August 21, 1986

CONSTITUTION OF THE UNITED STATES

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use, without just compensation.

TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Chapter I

APPLICABILITY

Article 1

Obligation to Furnish Assistance

1. The Contracting Parties undertake to afford each other, in accordance with provisions of this Treaty, mutual assistance in:

a. investigations or court proceedings in respect of offenses the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof;

b. effecting the return to the requesting State, or a state or canton thereof, of any objects,

articles or other property or assets belonging to it and obtained through such offenses;

c. proceedings concerning compensation for damages suffered by a person through unjustified detention as a result of action taken pursuant to this Treaty.

2. For the purposes of this Treaty, an offense in the requesting State is deemed to have been committed if there exists in that State a reasonable suspicion that acts have been committed which constitute the elements of that offense.

3. The competent authorities of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the

perpetrator of an offense falling within the purview of this Treaty. Agreements to this effect shall be concluded by exchange of diplomatic notes.

4. Assistance shall include, but not be limited to:

a. ascertaining the whereabouts and addresses of persons;

b. taking the testimony or statements of persons;

c. effecting the production or preservation of judicial and other documents, records, or articles of evidence;

d. service of judicial and administrative documents; and

e. authentication of documents.

Article 2

Non-Applicability

1. This Treaty shall not apply to:
   a. extradition or arrests of persons accused or convicted of having committed an offense;
   b. execution of judgments in criminal matters;
   c. investigations or proceedings:
      (1) concerning an offense which the requested State considers a political offense or an offense connected with a political offense;
      (2) concerning offenses in violation of the laws relating to military obligations;
      (3) concerning acts by a person subject to military law in the requesting State which

constitute an offense under military law in that State but which would not constitute an offense in the requested State if committed by a person not subject to military law in the requested State;

(4) for the purpose of enforcing cartel or antitrust laws; or

(5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed in items 26 and 30 of the Schedule to this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

2. Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in subparagraphs c. (1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article 6 and

a. in the case of subparagraphs c. (1) and (4), the request relates to an offense committed in furtherance of the purposes of an organized criminal group described in paragraph 3 of Article 6, or

b. in the case of subparagraph c. (5), any applicable conditions of Article 7 are satisfied.

3. Contributions to social security and governmental health plans, even if levied

as taxes, shall not be considered as taxes for the purpose of this Treaty.

4. If the acts described in the request contain all the elements of an offense for the investigation or prosecution of which assistance is required to be or may be granted as well as all the elements of an offense for which such assistance cannot be granted, assistance shall not be granted if under the law of the requested State punishment could be imposed only for the latter offense unless it is listed in the Schedule.

* * *

Chapter II

SPECIAL PROVISIONS CONCERNING ORGANIZED CRIME

Article 6

General Requirements

1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

   a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:

(1) a member of such group; or

(2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

(3) a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accomodate the desires of such a group or its members.

3. For the purposes of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of

obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

(1) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade

unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b (1).

Article 7

Extent of Assistance

1. Compulsory measures referred to in Article 4 shall also be employed in the requested State even if the investigation or proceeding in the requesting State concerns acts which would not be punishable under the law in the requested State, or which are not listed in the Schedule, or neither. This paragraph is

subject to the limitations of paragraph 2.

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income referred to in Article I of the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income [1] only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or

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[1] TIAS 2316; 2 UST 1753.

otherwise, in any important activity of such group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

3. Paragraphs 1 and 2 apply only if the requesting State reasonably concludes that the securing of the information or evidence is not possible without the cooperation of the authorities in the requested State, or that it would place unreasonable burdens on the requesting State or a state or canton thereof.

Article 8

Applicable Procedure

1. In all cases where this Chapter requires a reasonable suspicion or a reasonable conclusion, or the opinion of the requesting State, that State shall furnish to the requested State information in its possession on the basis of which such suspicion, conclusion, or opinion has been arrived at. However, this shall not oblige the requesting

State to identify the persons who have provided such information. Upon application of the requesting State, the Central Authority of the requested State shall treat any information furnished in the request as confidential.

* * *

SCHEDULE

OFFENSES FOR WHICH COMPULSORY MEASURES ARE AVAILABLE

1. Murder.
2. Voluntary manslaughter.
3. Involuntary manslaughter.
4. Malicious wounding; inflicting grievous bodily harm intentionally or through gross negligence.
5. Threat to commit murder; threat to inflict grievous bodily harm.

6. Unlawful throwing or application of any corrosive or injurious substances upon the person of another.
7. Kidnaping; false imprisonment or other unlawful deprivation of the freedom of an individual.
8. Willful nonsupport or willful abandonment of a minor or other dependent person when the life of that minor or other dependent person is or is likely to be injured or endangered.
9. Rape; indecent assault.
10. Unlawful sexual acts with or upon children under the age of sixteen years.
11. Illegal abortion.
12. Traffic in women and children.
13. Bigamy.
14. Robbery.
15. Larceny; burglary; house-breaking or shop-breaking.

16. Embezzlement; misapplication or misuse of funds.

17. Extortion; blackmail.

18. Receiving or transporting money, securities or other property, knowing the same to have been embezzled, stolen or fradulently obtained.

19. Fraud, including:

    a. obtaining property, services, money or securities by false pretenses or by defrauding by means of deceit, falsehood or any fraudulent means;

    b. fraud against the requesting State, its states or cantons or municipalities thereof;

    c. fraud or breach of trust committed by any person;

    d. use of the mails or other means of communication with intent to defraud or deceive, as punish-

able under the laws of the requesting State.

20. Fraudulent bankruptcy.

21. False business declarations regarding companies and cooperative associations, inducing speculation, unfaithful management, suppression of documents.

22. Bribery, including soliciting, offering and accepting.

23. Forgery and counterfeiting, including:

    a. the counterfeiting or forgery of public or private securities, obligations, instructions to make payment, invoices, instruments of credit or other instruments;

    b. the counterfeiting or alteration of coin or money;

    c. the counterfeiting or forgery of public seals, stamps or marks;

d. the fraudulent use of the foregoing counterfeited or forged articles;

e. knowingly and without lawful authority, making or having in possession any instrument, instrumentality, tool or machine adapted or intended for the counterfeiting of money, whether coin or paper.

24. Knowingly and willfully making, directly or through another, a false, fictitious or fraudulent statement or representation in a matter within the jurisdiction of any department or agency in the requesting State, and relating to an offense mentioned in this Schedule or otherwise falling under this Treaty.

25. Perjury, subornation of perjury and other false statements under oath.

26. Offenses against the laws relating to bookmaking, lotteries and gambling when conducted as a business.

27. Arson.

28. Willful and unlawful destruction or obstruction of a railroad, aircraft, vessel or other means of transportation or any malicious act done with intent to endanger the safety of any person travelling upon a railroad, or in any aircraft, vessel or other means of transportation.

29. Piracy; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.

30. Offenses against laws (whether in the form of tax laws or other laws)

prohibiting, restricting or controlling the traffic in, importation or exportation, possession, concealment, manufacture, production or use of:

a. narcotic drugs, cannabis sativa-L, psychotropic drugs, cocaine and its derivatives;

b. poisonous chemicals and substances injurious to health;

c. firearms, other weapons, explosive and incendiary devices;

when violation of such laws causes the violator to be liable to criminal prosecution and imprisonment.

31. Unlawful obstruction of court proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by the influencing, bribing, impeding, threatening, or injuring of any officer of

the court, juror, witness, or duly authorized criminal investigator.

32. Unlawful abuse of official authority which results in deprivation of the life, liberty or property of any person.

33. Unlawful injury, intimidation or interference with voting or candidacy for public office, jury service, government employment, or the receipt or enjoyment of benefits provided by government agencies.

34. Attempts to commit, conspiracy to commit, or participation in, any of the offenses enumerated in the preceding paragraphs of this Schedule; accessory after the fact to the commission of any of the offenses enumerated in this Schedule.

35. Any offense which one of the above listed offenses is a substantial element, even if, for purposes of

jurisdiction of the United States Government, elements such as transporting, transportation, the use of the mails or interstate facilities are also included.

SWISS FEDERAL BANKING LAW

Article 47 [1]

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a respresentative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 francs.

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[1] This particular translation of Article 47 into English was performed and published by the Union Bank of Switzerland, Zurich.

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.

3. The violation of professional secrecy remains punishable even after the termination of the official or professional relationship, or the exercise of the profession.

4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

THE ALL WRITS ACT

28 U.S.C. § 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16(a)(1)(C)

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.